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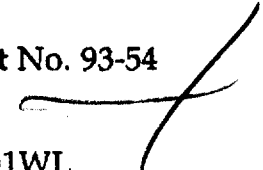
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission

Washington, D.C. 20554

.....
In the Matter of the Application of)
)
GAF BROADCASTING COMPANY, INC.,)
)
For Renewal of License of Station)
WNCN (FM), New York, New York)
.....)

MM Docket No. 93-54

File No. 
BRH-910201WL

.....
In the Matter of the Application of)
)
CLASS ENTERTAINMENT AND)
COMMUNICATIONS, L.P.)
)
For a Construction Permit for a New FM Station)
on 104.3 MHz at New York, New York)
.....)

File No.
BPH-910430ME

To: The Commission

APPLICATION FOR REVIEW

LISTENERS' GUILD, INC. ("Guild"), by its attorney, David M. Rice, pursuant to 47 C.F.R. § 1.115, hereby applies for review of the *Memorandum Opinion and Order* of the Review Board, released November 23, 1993 (FCC 93R-61) ("*Order*"), insofar as said *Order* denied the Guild's appeal from the *Memorandum Opinion and Order* of Administrative Law Judge Joseph Chachkin ("ALJ"), released September 17, 1993 (FCC 93M-593) ("*ALJ Order*"), which, *inter alia*, conditionally granted the application of GAF Broadcasting Company, Inc. ("GAF") for renewal of the license of station WNCN (FM),

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New York, New York,¹ and terminated the above-captioned hearing proceeding.

The Guild's *Appeal* to the Review Board was filed as a protective measure to ensure that the rights of the Guild were preserved. The Review Board, however, concluded that said appeal was unauthorized, since "47 C.F.R. 1.302 (a) provides that only a 'party to the proceeding' may appeal an ALJ ruling terminating a hearing proceeding," *Order*, para. 4, and the Guild had previously² been denied party status in the hearing proceeding. *Id.* The Guild respectfully submits that the Review Board's narrow and literal application of 47 C.F.R. § 1.302 (a) failed to take into account other pertinent — indeed, controlling — provisions of the Communications Act and the Commission's Rules.

Commission review of the *Order* is warranted because the Review Board's denial of the Guild's appeal was arbitrary and capricious and constituted prejudicial procedural error. Moreover, as more fully discussed *infra*, the Review Board's decision raises novel and important issues regarding the proper interpretation and application of the Commission's rules in harmony with the requirements of the Communications Act, so as to warrant

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1. On December 18, 1993, GAF changed the station's call sign to WAXQ (FM) in conjunction with a change of the station's format from "classical" to "pure rock" music. The Guild will continue to refer to the station as "WNCN" herein, however.
 2. See *Hearing Designation Order*, No. DA 93-226 (released Mar. 15, 1993) ("HDO"), *reconsideration denied*, *Memorandum Opinion and Order*, FCC 93-385 (released Aug. 16, 1993) ("Reconsideration Order"), *appeal pending sub nom. Listeners' Guild, Inc. v. FCC*, No. 93-1618 (D.C. Cir. filed Sept. 14, 1993), *review pending sub nom. Listeners' Guild, Inc. v. FCC*, No. 93-1687 (D.C. Cir. filed Oct. 14, 1993); *Memorandum Opinion and Order*, FCC 93M-360 (released June 15, 1993) (Chachkin, ALJ), *appeal denied*, *Memorandum Opinion and Order*, FCC 93R-50 (released Sept. 13, 1993) (Rev. Bd.), *Application for Review pending* (filed Oct. 12, 1993).

Commission review thereof. The Review Board has been afforded an opportunity to pass upon all questions of fact and law upon which this application relies.

THE GUILD'S RIGHT TO REVIEW

Section 402 (b)(6) of the Communications Act, 47 U.S.C. § 402(b)(6), provides that an appeal to the United States Court of Appeals for the District of Columbia Circuit may be taken "[b]y any . . . person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application [for renewal of a station license]." Under that provision, the Guild, which, on behalf of its members, petitioned to deny the renewal of GAF's license for WNCN, clearly is entitled to appeal a grant of such a renewal. Moreover, the Commission's Rules provide that "[t]he filing of an application for review shall be a condition precedent to judicial review of any action taken pursuant to delegated authority," 47 C.F.R. § 1.115 (k), and that a presiding officer's ruling terminating a hearing proceeding becomes effective either 30 or 50 days after its release unless an appeal to the Review Board³ is timely noticed and perfected. 47 C.F.R. § 1.302 (b).

The Guild thus actually was *required* by the Commission's Rules, in order to preserve its clear statutory right to judicial review of a grant of GAF's renewal application, to appeal the *ALJ Order* terminating the hearing and granting renewal, and then to apply for Commission review when the

3. The Commission's Rules make no provision for immediate filing of an application for review by the Commission of an ALJ ruling terminating a hearing proceeding without first prosecuting an appeal to the Review Board.

Review Board denied the appeal. The Review Board's ruling, however, is to the effect that the Guild may not follow that procedural route.

While the outcome of the Guild's appeal to the Review Board may indeed largely have been dictated by prior rulings (upon which the *ALJ Order* also had relied in terminating the hearing proceeding and renewing GAF's license), it does not follow that the Board lacked jurisdiction to hear and decide the Guild's appeal, nor that it was inappropriate for the Guild to have filed it. If the Guild had not appealed the *ALJ Order* to the Review Board and had not now applied for review of the Review Board's *Order*, its right to judicial review might not — in light of 47 C.F.R. § 1.115 (k) — have included a direct appeal from the order renewing GAF's license, which is precisely the right which the statute confers upon it.

Nor is it clear that the Guild could secure equivalent judicial review of the Commission's actions in this docket by appealing and/or petitioning for review of Commission orders denying the Guild participation as a party in the hearing proceeding and refusing to designate therein issues raised in the Guild's pleadings. Appeal of such orders is not provided for by the literal terms of 47 U.S.C. § 402 (b), since they do not themselves grant or deny a renewal or other license application. And although the requirements for review of such orders pursuant to 47 U.S.C. § 402 (a) are literally satisfied, owing to their finality in determining the rights of the Guild, judicial precedent suggests that review of such orders may not be obtainable under 47 U.S.C. § 402 (a), since review not only of all licensing decisions but also of orders ancillary to the broadcast licensing process has been delegated by

Congress exclusively to the District of Columbia Circuit.⁴ Moreover, beyond the foregoing uncertainties as to the proper form and forum for judicial review, there also is doubt as to whether such ancillary orders of the Commission would be ripe for judicial review, owing to their dispositive effect on the Guild's rights, or whether only an ultimate order renewing the license can be reviewed by the Court of Appeals.⁵

Regardless of the extent to which judicial review of the Commission's actions denying the Guild participation as a party in the hearing proceeding and refusing to designate therein the issues raised by the Guild in its pleadings may be available, the Guild should not be prevented from securing more complete protection of its rights by complying with all Commission-imposed prerequisites to direct judicial review of the renewal of GAF's license. Nor should the Guild be required to bear any risk of losing its right to contest the renewal of GAF's license by failing to appeal that action directly, so that even if it ultimately were to succeed in establishing that it should have been granted party status or that issues it had raised should have been designated for hearing, the fruits of such a victory might be lost.

4. See, e.g., *Hubbard Broadcasting, Inc. v. FCC*, 684 F.2d 594 (8th Cir. 1982), cert. denied, 459 U.S. 1202 (1983). Consequently, as a protective measure to assure that its right to judicial review is fully protected despite the foregoing uncertainties, the Guild has filed both a *Notice of Appeal* and a *Petition for Review* of the HDO in the U.S. Court of Appeals for the District of Columbia Circuit, which, upon the Guild's motion, has consolidated the two proceedings.

5. The Commission's counsel in the proceedings now pending before the District of Columbia Circuit has suggested informally to the Guild's counsel that the Commission may contend that the latter view is correct. While the Guild does not agree with that interpretation, it should not be faulted for protecting against the possibility that the Commission might so contend, or that the Court of Appeals might raise such a jurisdictional issue *sua sponte*.

The Guild took pains to make clear to the Review Board that its appeal was being filed to protect the Guild's rights, and it carefully avoided burdening the Board with factual and legal arguments repetitious of those in its prior pleadings. Given the inherent conflict between the Communications Act and the Commission's Rules, the procedure followed by the Guild imposed the minimum burden upon the Review Board, consistent with safeguarding the Guild's statutory right to judicial review.

Under the foregoing circumstances, the Review Board's literal interpretation of 47 C.F.R. § 1.302 (a) as precluding the Guild's appeal was arbitrary and capricious, and prejudicial to the Guild's rights under 47 U.S.C. § 402 (b) (6).

CONCLUSION

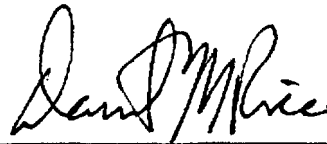
For the reasons set forth herein, the Commission should grant review of the *Order*. Such review should be consolidated with review of the prior *Memorandum Opinion and Order* of the Review Board, released September 13, 1993 (FCC 93R-50),⁶ with respect to which the Guild filed an *Application for Review* on October 12, 1993. Upon such consolidated review, the Commission should, for the reasons set forth in the Guild's October 18, 1993 *Appeal* as well as in its October 12, 1993 *Application for Review*, reverse both the September 13, 1993 and November 23, 1993 *Orders* of the Review Board, and should reopen

6. The Review Board's September 13, 1993 *Memorandum Opinion and Order* denied the Guild's appeal from the ALJ's *Memorandum Opinion and Order*, released June 15, 1993 (FCC 93M-360), which had denied the Guild's *Petition for Intervention* in the hearing proceeding and also had denied the Guild's *Motion to Enlarge Issues* therein.

the hearing proceeding, permit the Guild to intervene as a party therein and enlarge the hearing issues as requested by the Guild.

Dated: December 23, 1993

Respectfully submitted,



David M. Rice

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(516) 747-7979

Attorney for Listeners' Guild, Inc.

CERTIFICATE OF SERVICE

I, DAVID M. RICE, hereby certify that the foregoing "APPLICATION FOR REVIEW" was served this 23rd day of December, 1993, by mailing a true copy thereof by United States first class mail, postage prepaid, to each of the following:

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A handwritten signature in dark ink, appearing to read "David M. Rice", is written over a horizontal line.

David M. Rice